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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	CASE NO. 15-CR-00579-VC-4
)	
Plaintiff,)	UNITED STATES OPPOSITION TO
)	DEFENDANT'S MOTION FOR
v.)	COMPASSIONATE RELEASE FROM CUSTODY
RAMON MEDINA AGUILAR,)	
)	
Defendant.)	
)	

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Defendant Ramon Medina Aguilar is currently serving a 70-month sentence for his convictions of conspiracy to distribute and possess with intent to distribute heroin and methamphetamine (Count 1) and distribution and possession with intent to distribute heroin (Count 12), at Reeves I & II CI, with an anticipated release date of September 17, 2022. He seeks relief pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). Dkt. 797 (Motion). The United States opposes Defendant's motion.

BACKGROUND

Defendant was charged with violations of 21 U.S.C. §§ 846 (conspiracy to distribute and possess with intent to distribute heroin and methamphetamine) (Count 1), 841(a)(1) and (b)(1)(C) (distribution and possession with intent to distribute heroin) (Counts 10-12, 14), and 841(a)(1) and (b)(1)(A) (distribution and possession with intent to distribute 50 grams and more of methamphetamine) (Count 13). Dkt. 179 (Superseding Indictment). Defendant was arrested and detained pending trial.

On March 22, 2017, Defendant was convicted by plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) of drug conspiracy (Count 1) and heroin distribution and possession with intent to distribute (Count 12). Defendant's plea agreement waived his right to move for relief under 18 U.S.C. § 3582.¹ Dkt. 332 (Plea Agreement) ¶ 4. Defendant's conviction was based on his conduct in conspiring to distribute and distributing heroin and methamphetamine between April 2014 and December 2015. *Id.* ¶ 2. He did so by processing and packaging drugs for delivery, delivering drugs as a courier, receiving drug payments from drug customers, and training new drug couriers. *Id.* Between May and December 2015, for example, Defendant and his associates distributed approximately half a kilogram of heroin and additional quantities of methamphetamine per week and they took in between \$2,500 and \$3,500 per day in drug proceeds. *Id.*

On October 10, 2017, this Court sentenced Defendant to two concurrent terms of 70 months of imprisonment and two concurrent terms of five years of supervised release. Dkt. 568 at 2, 3 (Judgment). The Court recommended that Defendant be placed in a facility as close as possible to Manteca, California to facilitate family visits. *Id.* at 2. This Court ordered Defendant to self-surrender on November 9, 2017. Defendant is presently serving his sentence at Reeves I & II, CI in Texas, with a

¹ The United States, however, does not invoke the § 3582 waiver as a basis to deny this motion.

1 projected release date of September 17, 2022. U.S. Federal Bureau of Prisons, Find an inmate, *available*
 2 at <https://www.bop.gov/inmateloc/> (last accessed Mar. 9, 2021).

3 Defendant is presently 30 years old and has an active immigration detainer from U.S.
 4 Immigration and Customs Enforcement (ICE) in his file. The U.S. Probation Office's Presentence
 5 Investigation Report noted that Defendant had no health conditions. His medical records, obtained from
 6 the Bureau of Prisons (BOP), also appear not to document any health conditions other than latent
 7 tuberculosis, a condition for which Defendant refused further treatment.

8 On December 10, 2020, Defendant submitted a petition for compassionate release to the Facility
 9 Administrator at Reeves I & II, CI. Ex. 1 to Motion. The Facility Administrator made a non-final
 10 recommendation denying his petition based on the active ICE detainer.

11 ARGUMENT

12 I. DEFENDANT HAS ADMINISTRATIVELY EXHAUSTED

13 Because Defendant has exhausted the statutory prerequisites for seeking judicial relief, this Court
 14 may consider Defendant's motion. Defendant submitted a letter dated December 10, 2020 to the facility
 15 administrator at Reeves I & II, CI requesting compassionate release. Ex. 1 to Mot. Thirty days have
 16 lapsed since December 10, 2020; thus, this Court may review Defendant's motion on the merits.

17 II. REDUCTION OF DEFENDANT'S SENTENCE IS NOT WARRANTED

18 Although the COVID-19 pandemic is an extraordinary world event, Defendant has failed to
 19 show that that its impact on him, specifically, warrants his immediate release pursuant to 18 U.S.C.
 20 § 3582(c)(1)(A) because he is not suffering from a medical condition that the CDC has identified as
 21 particularly at risk for severe symptoms if he were to contract COVID-19, because he presents a danger
 22 to the community, and because re-balancing the Section 3553(a) factors does not indicate Defendant
 23 should be released immediately as he seeks.

24 A. Applicable law

25 This Court may only reduce a sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) if, "after
 26 considering the factors set forth in section 3553(a) to the extent that they are applicable," the Court
 27 "finds that" either "extraordinary and compelling reasons warrant such a reduction," or the defendant is
 28 at least 70 years old and has served at least 30 years in prison, "and that such a reduction is consistent

with applicable policy statements issued by the Sentencing Commission.” *See, e.g., United States v. Reid*, No. 17-cr-00175-CRB-1, Dkt. 554 (N.D. Cal. May 5, 2020); *United States v. Robinson*, No. 18-CR-00597 RS, Dkt. 33 (N.D. Cal. Apr. 27, 2020).

The pertinent policy statement is set forth at United States Sentencing Guidelines (USSG) § 1B1.13. It prohibits this Court from reducing a defendant’s sentence unless the Court determines that “the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g).” *See United States v. Cazarez*, No. 15-CR-00362-CRB-1, Dkt. 78 (N.D. Cal. May 4, 2020) (denying compassionate release claim due to danger).

The Sentencing Commission also provided explicit examples of what constitutes an “extraordinary and compelling circumstance”:

(A) Medical Condition of the Defendant.—

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the Defendant — The Defendant is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the ageing process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment; whichever is less.

(C) Family Circumstances. —

(i) The death or incapacitation of the caregiver of the defendant’s minor child or minor children.

(ii) The incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or the registered partner.

1 USSG § 1B1.13 cmt. n.1.

2 USSG § 1B1.13 is binding on district court's discretion in determining whether the defendant
 3 has presented an extraordinary and compelling reason for early release. Any reduction in a defendant's
 4 sentence under 18 U.S.C. § 3582(c)(1)(A) must be "consistent with applicable policy statements issued
 5 by the Sentencing Commission," which are included in USSG § 1B1.13. The Supreme Court analyzed
 6 an identical statutory requirement in § 3582(c)(2) and held that the relevant USSG policy statement is
 7 binding, not advisory. *Dillon v. United States*, 560 U.S. 817, 819, 825–28, 830 (2010). The same logic
 8 applies here.² While some courts have held that the First Step Act of 2018 altered the binding nature of
 9 USSG § 1B1.13, which has not been updated since the Act's passage to reflect that defendants can file
 10 their own motions after exhausting administrative remedies, the First Step Act did not alter the key
 11 language that the Supreme Court found determinative and binding with respect to subpart (c)(2) in
 12 *Dillon*. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (effective December 21, 2018).
 13 The Second Circuit recently held that USSG § 1B1.13 is out of step with Congress' intent shown by
 14 passing the First Step Act and thus does not apply to motions made by defendants rather than the
 15 Director of BOP. *United States v. Brooker*, 976 F.3d 228, 234–37 (2d Cir. 2020).³

16 This Court should reject the Second Circuit's position, which is inconsistent with *Dillon*—
 17 precedent which *Brooker* fails entirely to address. *See Brooker*, 976 F.3d at 234–38. This Court should
 18 instead join the other courts that have found USSG § 1B1.13 to remain binding, and hold that the policy

20 ² As the Court found in *Dillon*, here Congress explicitly gave authority to the Sentencing Commission
 21 to further describe what conduct would authorize a court to order a compassionate release. Specifically,
 22 28 U.S.C. § 994(t) states that the Sentencing Commission "shall describe what should be considered
 extraordinary and compelling reasons for sentence reduction" under § 3582(c)(1)(A), "including the
 criteria to be applied and a list of specific examples." The statute also states that "[r]ehabilitation of the
 defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t).

23 ³ District courts across the country are divided over this question, including in this district. *Compare*
 24 *United States v. Rodriguez*, 2019 WL 6311388, at *7 (N.D. Cal. Nov. 25, 2019) (holding that because
 25 the policy statement has not been revised since the First Step Act was enacted, district courts are free to
 26 consider circumstances beyond those enumerated in USSG § 1B1.13), *and United States v. Chan*, 2020
 27 WL 1527895, at *8 (N.D. Cal. Mar. 31, 2020) (same), *with United States v. Flores*, 17-CR-00373-CRB-
 28 2, ECF No. 85 at 3 (N.D. Cal. Sept. 21, 2020) (holding USSG § 1B1.13 is still binding and citing
Dillon), *United States v. Eberhart*, 448 F. Supp. 3d 1086, 1090 (N.D. Cal. 2020) (same), *and United*
States v. Shields, 2019 WL 2645028, (N.D. Cal. June 27, 2019). *See also United States v. Willingham*,
 2019 WL 6733028, at *2 (S.D. Ga. Dec. 10, 2019) (collecting district court cases finding USSG
 § 1B1.13 to be binding, and those finding it not to be).

1 statement constrains courts in all motions brought under 18 U.S.C. § 3582(c)(1)(A), not just those
2 brought by the Director of BOP. *See, e.g., United States v. Saldana*, 807 F. App'x 816, 820 (10th Cir.
3 2020) (dismissing motion for lack of jurisdiction where defendant's motion did not claim a reason
4 identified within USSG § 1B1.13). Following the logic of the Second Circuit's opinion means a
5 defendant could bring a request to BOP that BOP is required to deny under USSG § 1B1.13, but which
6 the district court could then review without any similar limitation. This would run counter to Congress'
7 intent "to authorize only a limited adjustment to an otherwise final sentence." *Dillon*, 560 U.S. at 826.

8 Notably, the First Step Act did not change the factors relevant to whether and how the courts
9 should modify a defendant's sentence, only the procedures by which a defendant can raise such claims.
10 Congress could have updated the substantive requirements for § 3582(c)(1)(A) motions, but it did not do
11 so. Rather, Congress altered only procedurally who could bring a motion under § 3582(c)(1)(A) to the
12 district court, and, indeed, titled the portion of the First Step Act "Increasing the Use and Transparency
13 of Compassionate Release." *Brooker*, 976 F.3d at 233 (citing P.L. 115-391 § 603(b), 132 Stat. 5194,
14 5239). But increasing the use of the procedural vehicle, the transparency of the decision-making
15 process, and the speed with which a defendant receives an answer does not implicate *the criteria* courts
16 should use for determining if early release is appropriate. Congress left the requirements for eligibility
17 untouched by the First Step Act and still squarely within the Sentencing Commission's hands.

18 The best way to align with *Dillon*, preserve the language of USSG § 1B1.13, and remain
19 consistent with Congressional intent, is not to disregard the policy statement entirely when a defendant
20 brings a compassionate release motion, as the Second Circuit held in *Brooker*, 976 F.3d at 234–37, but
21 to continue to use the policy statement to define the criteria for defendants to be eligible for early release
22 *whether BOP or the defendant makes the motion* for sentence reduction. At the very least, even courts
23 who "have found the provision to be outdated have held it continues to provide 'helpful guidance.'" *United*
24 *States v. Burrill*, 445 F. Supp. 3d 22, 24–25 n.2 (N.D. Cal. 2020) (citation omitted). Continuing to follow the
25 listed reasons in USSG § 1B1.13 also furthers the policy of keeping "statutory exceptions to the general
26 rule of finality of judgment" limited. *Eberhart*, 448 F. Supp. 3d at 1090 (citing *Dillon* and holding
27 USSG § 1B1.13 is still binding).

Thus, in order to qualify for compassionate release after having exhausted his or her administrative remedies with the Bureau of Prisons, a defendant must be able to demonstrate one of the listed reasons in (A)–(C) above. *See United States v. Kelley*, 15-cr-00444-CRB-2, Dkt. 146 (N.D. Cal. May 27, 2020). The “catch-all” in USSG § 1B1.13 application note 1(D) should be read in the manner of maintaining some administrative discretion within BOP to determine if there are additional reasons, beyond what is strictly described in (A)–(C) but within the same type of considerations (*e.g.*, deteriorating mental or physical health, exigent family circumstances, or medical conditions which diminish an inmate’s ability to provide self-care in prison).⁴ In this case, the Director of BOP did not identify any “extraordinary and compelling reason” under Application Note 1(D), which is thus inapplicable to this situation. *See United States v. House*, No. 14-cr-00196-CRB-1, Dkt. 2202 at 4 n.2 (N.D. Cal. May 20, 2020) (holding (D) inapplicable even in light of the COVID-19 pandemic). Changes in sentencing law do not fall under any of the categories listed in USSG § 1B1.13.

Defendant bears the burden to show special circumstances meeting the high bar set by Congress and the Sentencing Commission for compassionate release to be granted. *See United States v. Shabudin*, No. 11-CR-00664-JSW-1, Dkt. 571 (N.D. Cal. May 12, 2020); *United States v. Greenhut*, 2020 WL 509385, at *1 (C.D. Cal. Jan. 31, 2020) (holding that defendant bears the burden of establishing entitlement to sentencing reduction and citing *United States v. Sprague*, 135 F.3d 1301, 1306-07 (9th Cir. 1998)).

For that reason, to state a cognizable basis for a sentence reduction based on a medical condition, Defendant first must establish that his condition falls within one of the categories listed in the policy statement. Those categories include, as particularly relevant here, (i) any terminal illness, and (ii) any “serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.” USSG § 1B1.13 cmt. n.1(A). If a defendant’s medical condition does not fall

⁴ Indeed, BOP promulgated Program Statement 5050.50, amended effective January 17, 2019, to set forth its own internal criteria for evaluating compassionate release requests. *See* https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

1 within one of the categories specified in the application note (and no other part of the application note
2 applies), his or her motion must be denied.

3 The existence of the COVID-19 pandemic, which poses a general threat to every non-immune
4 person in the country, does not by itself fall into either of those categories and therefore could not alone
5 provide a basis for a sentence reduction.⁵ As Chief Judge Hamilton recently held in this district,
6 “General concerns about possible exposure to COVID-19 do not meet the criteria for extraordinary and
7 compelling reasons for a reduction in sentence set forth in the Sentencing Commission’s policy
8 statement on compassionate release, U.S.S.G. §1B1.13.” *Eberhart*, 448 F. Supp. 3d at 1090; *see also*
9 *United States v. Raia*, 954 F.3d 594, 597 (3rd Cir. 2020) (“[T]he mere existence of COVID-19 in society
10 and the possibility that it may spread to a particular prison alone cannot independently justify
11 compassionate release, especially considering BOP’s statutory role, and its extensive and professional
12 efforts to curtail the virus’s spread.”). The categories encompass specific serious medical conditions
13 afflicting an individual inmate, not generalized threats to the entire population.

14 Nor would a defendant’s chronic but manageable underlying medical condition, alone, constitute
15 “extraordinary and compelling” circumstances. *See United States v. Arceo*, No. 09-CR-00616-EJD-1,
16 Dkt. 86 (N.D. Cal. May 22, 2020) (“[T]he mere fact that Defendant suffers from chronic conditions is
17 insufficient [for compassionate release].”). Indeed, before the outbreak of COVID-19, district courts
18 addressing § 3582(c)(1)(A) claims routinely noted: “To be faithful to the statutory language requiring
19 ‘extraordinary and compelling reasons,’ it is not enough that Defendant suffers from . . . chronic
20 conditions that [he] is not expected to recover from. Chronic conditions that can be managed in prison
21 are not a sufficient basis for compassionate release.” *United States v. Ayon-Nunez*, 2020 WL 704785, at
22 *2–3 (E.D. Cal. Feb. 12, 2020) (rejecting a claim for compassionate release from a defendant suffering
23 from severe back injuries and epilepsy) (quoting *United States v. Weidenhamer*, 2019 WL 6050264, at
24 *5 (D. Ariz. Nov. 8, 2019)). Compassionate release is “rare” and “extraordinary” and courts routinely
25

26
27 ⁵ Indeed, it is reported that some inmates are trying to contract COVID-19 in the hopes that it will
28 enable them to get released from prison. *See* <https://www.washingtonpost.com/nation/2020/05/12/inmates-coronavirus-infect-los-angeles/> (inmates in
LA county jail have attempted to infect themselves with COVID-19 in order to be released).

1 deny such claims. *See Arceo*, No. 09-CR-00616-EJD-1, Dkt. 86 (noting compassionate release is rare);
 2 *United States v. Mangarella*, 2020 WL 1291835, at *2–3 (W.D.N.C. Mar. 16, 2020) (“[A]
 3 compassionate release . . . is an extraordinary and rare event.” (citation omitted)).

4 But the combination of an inmate’s chronic medical condition and the risk of contracting
 5 COVID-19 in a custodial setting may constitute an extraordinary and compelling reason to grant a
 6 motion under 18 U.S.C. § 3582(c)(1)(A), where COVID-19 and an inmate’s medical condition would
 7 not individually suffice. If an inmate has a chronic medical condition that has been identified by the
 8 CDC as elevating the inmate’s risk of becoming seriously ill from COVID-19,⁶ that condition—in
 9 combination with the likelihood that a defendant may contract COVID-19 while incarcerated and suffer
 10 severe symptoms as a result—may constitute a “serious” medical condition “from which [the defendant]
 11 is not expected to recover,” which “substantially diminishes the ability of the defendant to provide self-
 12 care within the environment of a correctional facility.” USSG § 1B1.13 cmt. n.1(A)(ii)(I). But as part
 13 of its analysis of the totality of circumstances, the Court should also consider whether the inmate is more
 14 likely to contract COVID-19 if he or she is released than if he or she remains incarcerated. That will
 15 typically depend on the inmate’s proposed release plans and whether a known outbreak has occurred at
 16 his or her institution.

17 **B. Defendant has not presented extraordinary and compelling reasons warranting his**
 18 **release**

19 Defendant has not demonstrated that he has the sort of medical condition that places him on the
 20 CDC list of at-risk individuals who may suffer severe symptoms if they contract COVID-19. *See*
 21 Centers for Disease Control and Prevention, People with Certain Medical Conditions, *available at*
 22 <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last accessed
 23 Mar. 9, 2021). Indeed, Defendant does not allege that he has any underlying health conditions that
 24 would render him particularly susceptible to severe illness if he were to contract COVID-19.

27 ⁶ *See* Centers for Disease Control, *At Risk for Severe Illness*, *available at*
 28 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last
 modified July 17, 2020).

1 Instead, Defendant asserts in his motion that in August 2020, he experienced symptoms
2 consistent with COVID-19—a low grade fever, a sore throat, muscle and joint pain, shortness of breath,
3 loss of smell and taste, and headaches—but reports these symptoms have since subsided, leaving him
4 with shortness of breath, exhaustion, fatigue, “roughness in the chest,” and piercing lung pain. Mot. 4-5.
5 He claims that he developed these symptoms but was not tested for COVID-19 or provided any
6 treatment other than a suggestion that he buy allergy medication. *Id.* These allegations, however,
7 appear to be unsupported by his BOP medical records, as there is no documentation of his reporting of
8 such symptoms to facility staff. *See id.*

9 What Defendant’s medical records do document is his history of latent tuberculosis, as well as
10 his subsequent refusal of additional prophylaxis treatment for this condition despite a warning that such
11 a refusal could risk turning his tuberculosis status and possibly result in death. Defendant does not claim
12 his latent tuberculosis as a basis for his request for compassionate release. Even if he did, his latent
13 tuberculosis would not qualify as an extraordinary or compelling reason for his compassionate release
14 given his refusing further treatment to manage or address this condition.

15 Thus, the United States submits, Defendant is not particularly at a higher risk of severe illness or
16 death from COVID-19 according to CDC guidance and, as a result, Defendant does not meet any of the
17 listed reasons in USSG § 1B1.13 Application Note 1. Nor can Defendant describe any particularized
18 reason why he should be released apart from any other convicted defendant serving time at Reeves I &
19 II, CI; Defendant has not, for example, argued he is at higher risk of getting sick or dying from COVID-
20 19 based on a particular underlying health condition of his such as heart disease, diabetes, or lung
21 disease. *See* Centers for Disease Control and Prevention, People with Certain Medical Conditions,
22 available at <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>
23 (last accessed Mar. 9, 2021).

24 Furthermore, BOP has taken significant measures to protect the health of inmates in its charge.
25 BOP has had a Pandemic Influenza Plan in place since 2012. BOP Health Services Division, Pandemic
26 Influenza Plan-Module 1: Surveillance and Infection Control (Oct. 2012), available at
27 https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf. That protocol is lengthy and detailed,
28 establishing a six-phase framework requiring BOP facilities to begin preparations when there is first a

1 “[s]uspected human outbreak overseas.” *Id.* at i. The plan addresses social distancing, hygienic and
2 cleaning protocols, and the quarantining and treatment of symptomatic inmates. The Action Plan
3 requires that all inmates in every BOP institution be secured in their assigned cells/quarters for a period
4 of at least 14 days, in order to stop any spread of the disease. Only limited group gathering is afforded,
5 with attention to social distancing to the extent possible, to facilitate commissary, laundry, showers,
6 telephone, and computer access. Further, BOP has severely limited the movement of inmates and
7 detainees among its facilities. Though there will be exceptions for medical treatment and similar
8 exigencies, this step as well will limit transmissions of the disease. Likewise, all official staff travel has
9 been cancelled, as has most staff training. All staff and inmates have been and will continue to be issued
10 face masks and strongly encouraged to wear an appropriate face covering when in public areas when
11 social distancing cannot be achieved.

12 The Action Plan comprises of several additional preventive and mitigation measures, including
13 suspension of social visitation, internal inmate movements, legal visits, official staff travel, training,
14 access by volunteers and many contractors; extensive screening of staff and inmates (including
15 screening of all new inmates); quarantine; and modified operations to maximize social distancing as
16 much as practicable. *See* Federal Bureau of Prisons, BOP Implementing Modified Operations, *available*
17 *at* https://www.bop.gov/coronavirus/covid19_status.jsp (last accessed Mar. 9, 2021). All new BOP
18 inmates are screened for COVID-19 symptoms and risk of exposure. Asymptomatic inmates with a
19 documented risk of exposure will be quarantined; symptomatic inmates with documented risk of
20 exposure will be isolated and tested pursuant to local health authority protocols. In areas with sustained
21 community transmission, all facility staff will be screened for self-reported risk factors and elevated
22 temperatures.

23 As of May 18, 2020, all newly admitted inmates to any BOP detention center, jail, and institution
24 will be tested at a quarantine site for COVID-19, in addition to screening them for COVID-19 symptoms
25 and a temperature check, before they enter their designated BOP facility.⁷ The testing will be conducted
26 either using Abbott instruments on-site or through commercial lab contracts. Inmates who test positive
27

28 ⁷ *See* Federal Bureau of Prisons, BOP Announces Update on Inmate Movement, *available at*
https://www.bop.gov/resources/news/pdfs/20200527_press_release_inmate_movement.pdf.

1 or have symptoms consistent with COVID-19 will be placed in isolation, even if asymptomatic, until
2 they meet the current CDC release-from-isolation criteria. COVID-19 negative inmates will be placed
3 in quarantine for 14 days and have twice daily symptom screening and temperature checks. If they
4 develop COVID-19 symptoms during the 14 days, they will be retested for COVID-19 and placed in
5 isolation. At the end of the 14-day quarantine, an inmate will be retested for COVID-19. If the test is
6 negative, the inmate will be deemed appropriate to transfer from the quarantine site to their designated
7 institution. Both inmates and staff are required to wear face masks during any transfer that occurs.

8 Additionally, in light of the global pandemic, the BOP has been given expanded authority to
9 review inmates who are potentially vulnerable to COVID-19 earlier in their sentences for transfer from a
10 secure facility to home confinement. The Attorney General has directed the Director of the BOP to
11 prioritize granting home confinement to eligible inmates who are especially vulnerable to COVID-19
12 based on their age and underlying health conditions as identified by the Centers for Disease Control and
13 Prevention (“CDC”), where home confinement would be more effective in protecting their health, and
14 not present a great risk to public safety. Att’y Gen. Memo. (Mar. 26, 2020). The Attorney General has
15 also invoked his emergency authority to “lengthen the maximum amount of time for which the Director
16 is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2).”
17 Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, 134 Stat. 281,
18 § 12003(b)(2) (March 27, 2020). As a result, BOP is broadly evaluating inmates for placement in home
19 confinement according to internal guidelines, with priority given to those most vulnerable to COVID-19
20 and those at facilities most affected by COVID-19. Att’y Gen. Memo. (April 3, 2020); *see also* BOP
21 Memo. (May 8, 2020) (providing updated guidance allowing for consideration for home confinement of
22 inmates with minor disciplinary issues within the past twelve months).

23 Pursuant to the Attorney General’s directive, BOP is urgently assessing the inmate population for
24 home confinement. To date, BOP has transferred 22,539 inmates to home confinement since March 27,
25 2020, and BOP continues to aggressively screen all potential inmates for eligibility, without any need by
26 the inmate to apply for consideration. *See* COVID-19 Home Confinement Information,
27
28

1 <https://www.bop.gov/coronavirus/> (last accessed Mar. 9, 2021).⁸

2 Further details and updates of BOP's modified operations are available to the public on the BOP
3 website at a regularly updated resource page: www.bop.gov/coronavirus/index.jsp.

4 Defendant is serving his sentence at Reeves I & II, CI, which, according to BOP counsel and as
5 of March 8, 2021, has had no known active cases of inmates or staff testing positive for COVID-19, no
6 known inmate or staff deaths resulting from COVID-19, and 20 known cases of inmates and 49 known
7 cases of staff who have recovered from COVID-19. The facility is awaiting its first shipment of
8 vaccines. Due to his age and health, there is no estimate of when Defendant will be offered the vaccine.

9 **C. This Court may not modify Defendant's sentence because he is a danger to others**

10 This Court may not reduce Defendant's sentence unless it finds that "the defendant is not a
11 danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." USSG § 1B1.13(2). *See Cazarez*, No. 15-CR-00362-CRB-1, Dkt. 78 (denying compassionate release
12 claim due to danger). This record precludes such a finding.

14 Defendant's argument, interpreted broadly, is that any danger he poses a danger to the
15 community is outweighed by the risk that any continued exposure to COVID-19 at the facility will cause
16 him to suffer a heightened risk of complications or death. *See* Mot. at 10-11; *see also* Mot. at 9-10. But
17 Defendant has not substantiated his claim that he specifically faces a greater COVID-19 risk than other
18

19 ⁸ The United States notes, and the Court is likely aware, that BOP has exclusive authority to determine
20 the location where an inmate serves his or her custodial sentence, including whether transfer from a
21 secure facility to home confinement under 18 U.S.C. § 3624(c) is more appropriate for a particular
22 defendant. *See United States v. Ceballos*, 671 F.3d 852, 855 (9th Cir. 2011) (per curiam) ("The Bureau
23 of Prisons has the statutory authority to choose the locations where prisoners serve their sentence.");
24 *Reeb v. Thomas*, 636 F.3d 1224, 1226 (9th Cir. 2011) ("Congress delegated to the BOP the duty to
25 manage and regulate all federal penal and correctional institutions."); *see also Bonneau v. Salazar*, 804
26 F. App'x 717, 718 (9th Cir. 2020) (holding home confinement is a decision that is solely within the
27 province of the BOP); *see also Tapia v. United States*, 564 U.S. 319, 331 (2011) ("When a court
28 sentences a federal offender, the BOP has plenary control, subject to statutory constraints, over [the
place of imprisonment and treatment programs]."). Although this Court may make a non-binding
recommendation to BOP as to home confinement, BOP's designation decision "is not reviewable by any
court." 18 U.S.C. §§ 3621(b) & 3624(c); *see, e.g., United States v. Kim*, No. 17-CR-00355-YGR-1, Dkt.
96 (N.D. Cal. May 1, 2020) (denying defendant's motion for compassionate release but recommending
BOP place defendant in home confinement); *United States v. Jones*, No. CR 17-070 VC, Dkt. 93 (N.D.
Cal. Apr. 10, 2020) (same); *United States v. Fobbs*, No. 19-CR-410 WHA, Dkt. 32 (N.D. Cal. Apr. 7,
2020) (recommending BOP place defendant in home confinement).

1 inmates serving time at his facility, as discussed above, and he has not shown that his release from
2 custody would not pose a danger to the community.

3 Under § 3142(g), the Court must consider four factors in determining whether the defendant
4 might present a danger: (1) the nature and circumstances of the offense charged; (2) the weight of the
5 evidence against the defendant; (3) the history and characteristics of the defendant, including the
6 defendant's character, physical and mental condition, family and community ties, past conduct, history
7 relating to drug or alcohol abuse, criminal history, and record concerning appearance at court, and
8 (4) the nature and seriousness of the danger to any person or the community that would be posed by the
9 person's release. 18 U.S.C. § 3142(g)(1)–(4). Consideration of these factors—which are not affected by
10 COVID-19—does not allow this Court to conclude that Defendant is not a danger to the safety of any
11 other person or the community.

12 In this case, Defendant engaged in serious and dangerous conduct as summarized by the
13 following excerpt from the United States' sentencing memorandum:

14 Aguilar trained the other couriers, bringing additional people into this criminal activity.
15 Aguilar was instrumental to the spread of the drug distribution network that he and Eutimio
16 operated on a daily basis. He was the one looking into the eyes of the customers every day,
17 as he delivered the heroin and methamphetamine that ravaged their lives and the lives of
18 others. He was also the one who kept the other couriers in line, keeping an eye on Solorio
19 to make sure he did not steal. He was the one that Eutimio relied upon to assess whether a
20 customer was working with law enforcement. He was also the one that Eutimio entrusted
21 with preparing the drugs for distribution: mixing the heroin with adulterants to allow the
organization to increase its profits and packaging it in the appropriate units for distribution.
Moreover, he was the one to whom Eutimio turned for advice about how customers were
responding to the drugs, whether to renegotiate with a supplier, and what price to set. At
every stage of the process, Aguilar was at the heart of the day-to-day drug distribution
operation and showed himself to be deeply invested in its success.

22 Dkt. 555 (Gov't Sent'g Mem.). In other words, Defendant took on an extensive and central role
23 in the drug trafficking schemes, and granting him immediate compassionate release before the
24 completion of his custodial sentence would present too great a risk of Defendant returning,
25 undeterred, to continue these dangerous drug trafficking activities. That he has an active ICE
26 detainer in his file does not change this analysis: If Defendant is deported to Mexico upon his
27 release, he will most likely illegally reenter the United States instead of staying in Mexico, given
28 that both his partner (convicted co-defendant Elizabeth Reyna-Rodriguez) and their son are U.S.

1 citizens who have never lived in Mexico and are therefore unlikely to move to Mexico with him.
2 His return to the United States would risk his return to drug trafficking activity, which would
3 present a danger to the community. *See United States v. Zaragoza*, 2008 WL 686825, at *3
4 (N.D. Cal. Mar. 11, 2008) (Spero, J.) (“In assessing danger, physical violence is not the only
5 form of danger contemplated by the statute. Danger to the community can be in the form of
6 continued narcotics activity or even encompass pecuniary or economic harm.”).

7 Defendant remains a danger to the community and should be detained. He has not shown that
8 his current medical condition or risk of COVID-19 (a risk that applies in the community as well) makes
9 him less of a danger. The defense presents no additional facts that meaningfully shift the balance of the
10 § 3142(g) factors in Defendant’s favor.

11 In sum, Defendant has failed to demonstrate that the § 3142(g) factors the Court considered at
12 the time of detention have changed. The Court should deny his motion for immediate release.

13 **D. Section 3553(a) factors weigh against his release**

14 Finally, any compassionate-release decision—even for a statutorily eligible defendant—must
15 also consider the factors under 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3582(c)(1)(A)(i). In this case,
16 Defendant has about 18 months left on his 70-month sentence (approximately 26% left), and the
17 § 3553(a) factors still counsel in favor of his continued detention.

18 Defendant does not substantively address any of the § 3553(a) factors in his motion. Those
19 factors—which this Court already considered when imposing Defendant’s sentence—do not support his
20 request for premature, permanent release. As discussed in the United States’ sentencing memorandum,
21 Defendant played a central and critical role in the drug trafficking scheme by preparing drugs for
22 delivery, delivering drugs as a courier, training and managing the other couriers, and giving advice on
23 how to run the drug distribution network. Dkt. 555 at 4. Based on the gravity of his conduct, his
24 heightened culpability, and the need to avoid unwarranted sentencing disparities with the co-defendants
25 in this case, the United States argued at sentencing that a 70-month sentence was appropriate and
26 warranted for this Defendant. *See id.* at 4-5. These sentencing considerations still hold true today.

Granting Defendant's motion under 18 U.S.C. § 3582(c)(1)(A) would undermine these factors, resulting in an effective sentence that is approximately 26% shorter than the one that this Court deemed necessary for Defendant at the time of his sentencing.

Furthermore, granting compassionate release at this stage is premature because Defendant has not proposed a post-release plan. The active ICE detainer in his file indicates that he will likely be deported to Mexico at the time of his release. However, Defendant has not indicated whether he would be released to a stable housing environment in Mexico or how he plans to make a new life for himself in Mexico while his partner (convicted co-defendant Reyna-Rodriguez) and their son remain in the United States, where they are U.S. Citizens. He does not claim that his partner and their son, neither of whom has ever lived in Mexico, are ready, willing, or able to move to Mexico with him in the event of his immediate release. Thus, if Defendant is prematurely released, he will likely make illegal reentry back into the United States, where he may return to his drug trafficking activities undeterred.

III. IF THIS COURT MODIFIES DEFENDANT'S SENTENCE, IT SHOULD DO SO WITH APPROPRIATELY RESTRICTIVE CONDITIONS

If the Court is inclined to grant compassionate release, this Court should (1) order any release only after Defendant's travel and post-release plans are in place and, to minimize any risks to public health, (2) set any release for 14 days from the date of its order to accommodate BOP's ability to quarantine Defendant prior to his release to protect the community from potential further spread.

CONCLUSION

Defendant is a danger to others. He has not presented evidence of a serious medical condition that substantially impairs his ability to provide self-care or any other extraordinary or compelling reason to warrant a reduced sentence. This Court should deny Defendant's motion for immediate release under 18 U.S.C. § 3582(c)(1)(A)(i).

DATED: March 9, 2021

Respectfully submitted,

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/s/ Christina Liu
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